

1 BTA Lawgroup PLLC
31811 Pacific Highway South
2 Suite B-101
Federal Way, WA 98003
3 (253) 444-5660
(253) 444-5659 (Fax)

Honorable Marc Barreca
Chapter 7
Hearing Location: Seattle Courthouse
Hearing Date: October 25, 2013
Hearing Time: 9:30 a.m.
Response Date: October 18, 2013

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

In re: Russell Earl Burns and
Suzanne Kathryn Burns,

Debtors.

CHAPTER 7 PROCEEDINGS

NO. **11-17769-MLB**

**DEBTOR'S NOTICE AND
MOTION TO REOPEN CASE TO
HEAR A CONTEMPT MOTION
PURSUANT TO 11 USC §524(a)**

TO: THE HONORABLE UNITED STATES BANKRUPTCY JUDGE MARC
BARRECA

TO: BOEING EMPLOYEE'S CREDIT UNION;

AND TO: CLERK OF THE UNITED STATES BANKRUPTCY COURT, EDMUND J.
WOOD, CHAPTER 7 TRUSTEE, AND ALL INTERESTED CREDITORS.

NOTICE OF MOTION AND HEARING

PLEASE TAKE NOTICE that defendants' motion to re-open the above captioned
case is set for hearing as follows:

Honorable Marc Barreca:
United States Courthouse
700 Stewart Street, Courtroom 7106

Time: 9:30 a.m.

Date: October 25, 2013

MOTION TO REOPEN CASE TO FILE
AND HEAR A MOTION FOR CONTEMPT

BTA Lawgroup PLLC
31811 Pacific Highway South, B-101
Federal Way, WA 98003

1 Seattle, WA 98101

2 IF YOU OPPOSE the Motion, you must file your written response with the
3 Clerk's office of the Bankruptcy Court and deliver copies to the undersigned and all
4 interested parties, including the Chapter 7 Trustee, NOT LATER THAN THE
5 RESPONSE DATE, which is October 18, 2013. If you file a response you are also
6 required to appear at the hearing.

7 IF NO RESPONSE IS TIMELY FILED AND SERVED, the Court may, in its
8 discretion, GRANT THE MOTION PRIOR TO THE HEARING WITHOUT FURTHER
9 NOTICE, and strike the hearing.

10 Dated: September 6, 2013.

11 Moving Party,
12 BTA Lawgroup, PLLC

13 /s/ N. Brian Hallaq
14 N. Brian Hallaq, WSBA #29621
15 Attorney for Debtors

16 /s/ Jan Gossing
17 Jan Gossing, WSBA #31559
18 Attorney for Debtors

19 MOTION

20 The debtor in this case hereby requests an order reopening the Bankruptcy case
21 pursuant to 11 U.S.C. §350(b) and F.R.B.P. 5010 to file and hear a motion for contempt
22 pursuant to 11 USC §524(a).

23 STATEMENT OF THE FACTS

24 Facts related to the debtors' Bankruptcy case.

25 The debtor in this case filed for Chapter 7 Bankruptcy relief on June 29, 2011.
The debtors' schedules contained two entries for Boeing Employee's Credit Union
(*hereinafter* "BECU") on Schedule F:

BECU Recovery Department

Boeing Employees Credit Union

MOTION TO REOPEN CASE TO FILE
AND HEAR A MOTION FOR CONTEMPT

BTA Lawgroup PLLC
31811 Pacific Highway South, B-101
Federal Way, WA 98003

1 PO Box 97050, MS 1049-1
2 Seattle, WA 98124-9750

12770 Gateway Dr.
Tukwila, WA 98168

3 The debtors' §341 hearing was originally scheduled for August 4, 2011, and then
4 continued to August 18, 2011. BECU sent a representative to both §341 hearings. The
5 Chapter 7 Bankruptcy Trustee, Edmund Wood issued a report of no distribution on
6 August 25, 2011. The deadline for filing an action for non-dischargeability was October
7 3, 2011. No adversary action was filed. The debtors received their discharge on October
8 6, 2011.

9 Facts related to the underlying debt.

10 Russell and Suzanne Burns formerly owned real property located at 9440 171st
11 Ave. N.E., Redmond, Washington 98052. There were two mortgages (i.e. deeds of trust)
12 recorded against the property (Wells Fargo and BECU respectively). The Burns were
13 unable to service their mortgages, and the first mortgage (Wells Fargo) performed a non-
14 judicial foreclosure on August 20, 2010.

15 Funds in excess of those necessary to satisfy the balance on the first mortgage
16 (Wells Fargo) were received by the trustee who performed the non-judicial foreclosure,
17 and were deposited in the registry of the King County Superior Court.

18 Claimants to 'surplus funds' may seek disbursal of those funds pursuant to RCW
19 61.24.080(3). Any lienholder, as well as the former owners of the property, are
20 considered proper claimants. A hearing is held in the Superior Court to determine the
21 priority of the claimants. The priority of claimants is determined in accordance with their
22 relative priority to the property as they had existed prior to the foreclosure.

23 Normally, a consensual lienholder (such as a mortgage) trumps the homeowner in
24 priority to the surplus funds. RCW 61.24.080(3). Furthermore, normally a homeowner
25 (pursuant to their homestead exemption) trumps the interests of judgment lien creditors to
the extent of Washington's homestead act (i.e. all funds up to \$125,000.00).

1 In this case, the claim of BECU was not conventional. On October 24, 2005, the
2 Burns' obtained a loan for \$85,000.00 from Boeing Employees Credit Union ("BECU").
3 The loan was secured by a deed of trust, which was recorded on November 3, 2005 under
4 recording number 20051103000575, thus becoming a "2nd mortgage" or junior
5 consensual lienholder.

6 On December 5, 2008, BECU recorded a notice of trustee sale with respect to
7 their junior deed of trust. On April 14, 2009, BECU changed its mind about foreclosing
8 and elected to file a lawsuit against the Burns' on the promissory dated October 24, 2005
9 under King County case number 09-2-15744-8. On the same day, BECU obtained a
10 default judgment against the Burns'. On July 22, 2009, three months after filing the
11 lawsuit and obtaining a default judgment, BECU recorded a notice of discontinuance of
12 trustee sale. All this took place *prior to* the Wells Fargo non-judicial foreclosure.

13 The issue, therefore, became, what interest did BECU have on August 20, 2010,
14 when Wells Fargo performed their non-judicial foreclosure.

15 The Burns took the position that BECU had made an 'election of remedies.' That
16 is to say, that BECU had a consensual lien on the property which was linked to the
17 promissory note, but when BECU chose to sue on the promissory note and convert it to
18 an ordinary civil judgment, it elected to remove its consensual lienholder status in favor
19 of having judgment lienholder status.

20 The Burns' position is supported by the fact that generally speaking a deed of
21 trust cannot exist without a corresponding promissory note (i.e. when the note was
22 converted to a judgment, the deed of trust was extinguished), and it is not possible for the
23 same creditor to have multiple liens in the same property based upon the same debt (i.e.
24 either BECU was a mortgage holder or a judgment creditor, but they could not be both
25 based upon the doctrine of merger).

1 On October 7, 2009, BECU obtained a writ of garnishment against the Burns' and
2 began collecting on their judgment. On October 25, 2010, BECU moved for
3 disbursement of the surplus funds deposited by the foreclosing trustee in August 2010,
4 relying on their 2005 deed of trust, rather than their newer lien (judgment lien). The
5 Burns also moved for disbursal of the funds and a hearing was held on November 16,
6 2010.

7 At the trial court level, the Court Commissioner found that BECU's consensual
8 lien merged into their newer lien as a result of BECU's election of remedies, and awarded
9 the balance of surplus funds to the Burns. BECU filed a motion for revision on
10 November 24, 2010, which was denied. BECU then filed an appeal on December 15,
11 2010.

12 BECU did not file a supersedeas bond. BECU did not file any motion enjoining
13 the disbursement of the funds to the Burns.

14 Between December and June 2011 the Burns used the funds obtained from the
15 King County Superior Court action to live on. A portion of the fees were also paid to the
16 Burns' attorneys for their legal services. By June, 2011 the Burns had exhausted the
17 funds and were insolvent. The Burns filed for Chapter 7 Bankruptcy relief on June 29,
18 2011.

19 BECU, as the appealing party, felt that the issue of law as significant enough to
20 pursue. On September 2, 2011, counsel for the debtors agreed to a stipulated motion for
21 relief from stay for the sole purpose of resolving the legal issue in the appeal. There was
22 no agreement to reinstate any prepetition debt. BECU was a pre-petition creditor. Any
23 equitable claim that it had to the surplus funds was also pre-petition. In fact, counsel for
24 BECU represented that they simply wanted the appeal to continue for the sole purpose of
25 addressing an issue of law, and that they had no interest in pursuing the Burns personally.

1 After the debtors' discharge, the Washington State Court of Appeals found that a
2 mortgage holder could sue, obtain a civil judgment, collect on that judgment, while
3 maintaining its original consensual lien on real property (mortgage), despite the fact that
4 the promissory note had been extinguished by the civil suit.

5 On January 10, 2013, BECU moved the King County Superior Court to issue a
6 judgment against the debtors, Russell and Suzanne Burns, which was entered on February
7 7, 2013. This judgment relates solely to claims that arose before the filing of the Burns'
8 Chapter 7 Bankruptcy case. BECU has made threat to pursue the Burns and their counsel
9 if the funds disbursed at the trial court level are not disgorged, despite the fact that this
10 claim was pre-petition, the debtors obtained a judgment, and that BECU elected to forego
11 a supersedeas bond, as is the normal course of action in appeals.

12 **STATEMENT OF THE ISSUES**

13 Whether an order, in the form proposed by the debtor to reopen their bankruptcy
14 case to file and hear a motion for contempt pursuant to 11 USC §524(a) shall be entered.

15 **EVIDENCE RELIED UPON**

16 1) All Pleadings and Files on record herein.

17 **AUTHORITY**

18 11 USC §350(b) proves that:

19 A case may be reopened in the court in which such case was closed
20 to administer assets, to accord relief to the debtor, or for other
cause.

21 LBR 5010-1(a) provides in relevant part that:

22 A motion to reopen a case shall state the purpose for the reopening
23 and shall be noted for hearing in accordance with Local
24 Bankruptcy Rule 9013-1, with notice to the case trustee and any
affected parties. The notice shall state whether assets were
25 administered in the case, whether a deadline was established for
filing proofs of claim, and whether a trustee needs to be appointed.

1 The motion may be heard ex parte. *See, In re Menk*, 241 B.R. 896
2 (9th Cir. BAP 1999) (motion to reopen is a ministerial act with no
independent legal significance).

3 **ARGUMENT**

4 The facts are clear in this case. BECU received notice of the debtors' Ch. 7 filing.
5 BECU participated in two Section 341 hearings. BECU did not file a supersedeas bond.
6 BECU did not file an adversary action objecting to dischargeability in this case. All of
7 the acts, events, claims, debts, etc. existed pre-petition. At the time of the filing of the
8 debtors' Bankruptcy case, they were the prevailing party to the underlying state court
9 action and therefore they did nothing wrong.

10 Now BECU has obtained a civil judgment against them for a pre-petition debt.
11 The debtors respectfully request that this court enter an order re-opening this case in
12 order to allow the debtors file and hear a motion for contempt pursuant to 11 USC
13 §524(a). Specifically re-opening this case is justified to accord relief to the debtors
14 within the meaning of 11 USC §350(b).

15 No trustee needs to be appointed as the trustee in the above captioned case issued
16 a report of no distribution on August 25, 2011, no assets were administered in this case,
17 and no deadlines were established for filing proofs of claim.

18 **PROPOSED ORDER**

19 A proposed form of order accompanies this motion.

20 DATED this 6th day of September 2013.

21 BTA Lawgroup PLLC

22 /s/ N. Brian Hallaq
23 N. Brian Hallaq, WSBA#29621
24 Attorney for Debtors –
25 Russell Earl Burns and
Suzanne Kathryn Burns,